IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

ROBERT GONZALES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ROBERT GONZALES, your petitioner, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the above case pending in that Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, as yet unreported, appears at Appendix A, infra. The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the Honorable WARREN FEGUSON, trial judge, of the United States District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 6, 1972. A Petition for Rehearing was filed on June 16, 1972. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Further jurisdictional requisites are set forth in the Petition.

CONSTITUTIONAL PROVISIONS AND FEDERAL QUESTIONS PRESENTED

(A) Whether or not the doctrine of concurrent sentences should be invoked when the penalty under each of the concurrent sentences may have an adverse effect upon the petitioner.

(B) Whether the trial court may find petitioner guilty and sentence petitioner to prison on two counts (conspiracy to distribute heroin

and distribution of the same heroin) arising out of the same transaction.

(C) May contraband seized inside the subject premises, when petitioner is arrested outside, be introduced into evidence. (Fourth Amendment.)

(D) Is petitioner entitled to discover the identity and whereabouts of an informant who may give testimony about a possible entrapment of petitioner by a governmental agent.

STATEMENT OF THE CASE

Following a waiver of a jury trial by defendant Gonzales, the case was tried without a jury before the Honorable Warren J. Ferguson. On October 21, 1971, the Court found the defendant guilty on Counts I, VI through X and not guilty on Counts II through V and XI.

On November 15, 1971, the Court sentenced the defendant to eight (8) years on each of Counts I and VI through X to begin and run concurrently with each other.

Following an introduction to co-defendant Martinez, undercover officer Perry entered a series of purchases of heroin. The government refused to allow the informant's name or identity to be divulged. At the time of petitioner Gonzales' arrest, a quantity of heroin was found inside the premises where he had previously been.

Deputy Sheriff Robert Perry testified:

The witness saw co-defendant Martinez on July 21, 1971. He went with him to Walnut Avenue in Los Nietos. He spoke with a voice on the telephone who he now knows to be defendant Gonzales. Martinez and Gonzales exited the residence and Martinez had in his possession a wax bag (heroin)..

On July 27, 1971, the witness testified he purchased heroin from Martinez and Gonzales.

On August 4, 1971, the witness testified he purchased heroin from Martinez and Gonzales. After the purchase, the witness exited from the front door of the address, made prearranged signals to the surveilling officers, and proceeded back in the direction of the house with currency in his hand. Upon reaching half way back to the location, Gonzales was seen standing in the doorway.

Although the witness stated that he entered the location and effected the arrest of Gonzales within the location, the place of Gonzales' arrest was subsequently clarified as being outside of the premises.

Deputy Sheriff Clark testified that he arrested Gonzales outside of the house and then was taken back into the same door that he had come out of. There was then a search of the premises and contraband (Exhibit 5a at the trial) was located inside of the premises. Contraband found inside of the house forms the basis

for the conviction in Count X. There was a stipulation that Exhibit 5a was found to be a substance which contained a usable quantity of heroin and that the substance totalled approximately 267.6 grams. There was an objection to the introduction of Exhibit 5a, forming the basis of Count X. The evidence was received over objection.

The witness Perry was asked for the name of the person who introduced him to co-defendant Martinez. The Government objected to giving the name of the informant. The informant knew that Perry was a law enforcement officer. The officer, when asked whether or not the informant had made some contact with co-defendant Martinez concerning an introduction to the officer, responded that he had no independent knowledge of such transaction. The informant had been arrested for narcotics prior to meeting with the officer. There was a case pending against the informant at the time of the introduction of Martinez. The officer assumed that the informant was hoping for some assistance in his own case from the law enforcement officers if he would cooperate with them.

The informant was in a position to hear the conversation between police officer and Martinez on the date of the initial introduction and the informant, if he was identified could tell the Court whether or not the officer represented himself as a narcotics addict to Martinez.

Again defendant requested the name of the informant and again there was an objection

by the Government. Defendant stated his theory for requesting the identification of the informant; that is, the informant would state that Mr. Perry represented himself to Gonzales and co-conspirator Martinez as a user of narcotics and an addict, and because of this, induced Martinez and his co-defendant and co-conspirator Gonzales to sell narcotics to him. The Court refused to order disclosure of the informant by the officer.

In denying defendant's motion to compel disclosure of the informant, the Court stated:

> ". . . Mr. Martinez was here and he is going to be made available to you and we will have to see what happens. . . ."

Attorney Volney Brown appeared in Court and testified that he would instruct his client, Mr. Martinez, not to testify if called as a witness on behalf of the defendant Gonzales. The identity of the informant was never disclosed despite defendant's request.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals refused to consider two of appellant's three grounds on appeal (which two grounds go to five of the six counts on which appellant was convicted) because:

"We deem it unnecessary to consider the other errors claimed in the challenges to the five of the six counts. The appellant was found guilty on all six and sentenced on each to the same term, the sentences to be served concurrently. The validity of the sentence on the conspiracy count is sufficient to dispose of the case now before us. Benton v. Maryland, 395 U.S. 784, 791 (1969); Hirabayashi v. United States, 320 U.S. 81 (1943)."

It is true that the Court in Hirabayashi (an American of Japanese ancestry who was convicted and sentenced to concurrent three month sentences for violation of a special curfew directed against Japanese [The Supreme Court in 1943 traced the events surrounding Pearl Harbor and held that the Government could pass laws differentiating Japanese Americans from other Americans]) said that where sentences on each count run concurrently it is unnecessary to consider questions raised with respect to other counts if one count must be sustained.

This doctrine of "concurrent sentences" has been subsequently questioned by Federal Courts and did not prevent the Supreme Court in Benton, supra, from deciding appellant's grounds for appeal.

In Benton the petitioner was tried in a Maryland State Court for burglary and larceny. He was acquitted of larceny, but convicted of burglary and sentenced to 10 years in prison.

Because the grand and petit juries in petitioner's case had been selected under an invalid constitutional provision the case was remanded to the trial court and petitioner was re-indicted for larceny and burglary. Petitioner filed, on the ground of double jeopardy, a motion to dismiss the larceny count which the trial court denied. On retrial, he was found guilty of both offenses and concurrently sentenced to 15 years for burglary and five years for larceny.

On appeal, the State of Maryland suggested that the Court treat the concurrent sentence doctrine as a principal of judicial efficiency which permits judges to avoid decision of issues which have no appreciable impact on the right of any party. Maryland argued that the defendant should bear the burden of convincing the Appellate Court of the need to review all his concurrent sentences.

The Court felt that it need not apply the concurrent sentence doctrine as a rule of judicial convenience and raised the question (without resolving it) of whether the doctrine survives. Citing in part Sibron v. New York, 392 U.S. 40 (1968), the Court pointed out "the obvious fact that most criminal convictions do, in fact, entail adverse collateral legal consequences." The Court reviewed some possible adverse collateral effects of criminal convictions (even when there are concurrent sentences): (1) Some states consider prior felony convictions for the purpose of increasing sentences (see California Penal Code §788)

even if the convictions actually constituted only separate counts in a single indictment tried on the same day; (2) All the convictions might some day be put in issue at a future trial (California Evidence Code §§969, et seq.). "Although petitioner could explain that both convictions arose out of the same transaction, a jury might not be able to appreciate this subtlety."

The Court concluded in Benton that it could not say it lacked jurisdiction to decide petitioner's challenge to the larceny conviction even though he received concurrent sentences.

It is respectfully submitted that, in addition to the arguments against applying the concurrent sentence doctrine set forth above, there are more possible collateral effects from concurrent sentences such as: The date of release from prison being effected by the number of convictions and the question of whether the sentencing judge himself would have imposed the same sentence if there had been fewer convictions. For these reasons, the concurrent sentence doctrine should not have validity today.

On the one claim of error that the Court did consider, it concluded that a defendant may not seek shelter under the defense of entrapment claimed by another.

It is petitioner's theory, however, that the informant could testify to false representations made by officer Perry to co-defendant MARTINEZ or petitioner,

which false representations were either heard directly by the informant or later related to him by the officer.

Since the informant could testify to the statements of the undercover officer which statements could prove the theory of entrapment, and since the trial court refused to order such disclosure, defendant was precluded from asserting this defense.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT P. GORDON
MITCHELL W. EGERS

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	No. 72-1110
ROBERT GONZALES, Defendant-Appellant.	)	

Appeal from the United States District Court for the Central District of California

Before: MERRILL, TRASK and GOODWIN, Circuit Judges

PER CURIAM:

The appellant, Gonzales, was convicted on six counts of an eleven count indictment which charged him with conspiracy with one Martinez to possess heroin with intent to distribute it, and to distribute heroin, 21 U.S.C. §846; and with possession with intent to distribute heroin and distribution of that drug, 21 U.S.C. §841(a)(1). He was sentenced to serve six concurrent terms of eight years each.

On this appeal, he asserts three claims of error. The first two claims are directed to five of the six counts but not to the conspiracy count. This count is unchallenged, except to the extent that the defense of entrapment may be available to him. For easons hereinafter stated, we hold that the defense of entrapment is not so available.

We deem it unnecessary to consider the other errors claimed in the challenges to five of the six counts. The appellant was found guilty on all six and sentenced on each to the same term, the sentences to be served concurrently. The validity of the sentence on the conspiracy count is sufficient to dispose of the case now before us. Benton v. Maryland, 395 U.S. 784, 791 (1969); Hirabayashi v. United States, 320 U.S. 81 (1943).

The entrapment which is claimed relates to transactions which occurred between the government informant and appellant's co-conspirator. Appellant admits the informant had no direct contact with him. It is well established in this circuit that a defendant may not seek shelter under the defense of entrapment claimed by another. United States v. Sanchez, 440 F. 2d 649 (9th Cir. 1971); United States v. Azadian, 436 F. 2d 81 (9th Cir. 1971); Carbajal-Portillo v. United States, 396 F. 2d 944 (9th Cir. 1968).

The judgment is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff and Appellee, vs. ROBERT GONZALES, Defendant and Appellant.	)	FILED JUN 28, 1972 CLERK No. 72-1110

O R D E R

Before: MERRILL, TRASK and GOODWIN, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to deny the motion for stay of mandate.

The petition for rehearing and the motion for stay of mandate are both denied.